

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: SS64/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 21/05/2024

SIGNATURE

In the matter between:

THE STATE

and

MTHETHWA SIPHO

ACCUSED

JUDGMENT

DOSIO J:

Introduction

[1] The accused is arraigned on the following 12 counts, namely:

Count one, murder, in terms of s51(1) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997') in that it is alleged the accused murdered Sibusiso Zulu ('Mr Zulu') on 20 September 2020 at Jeppestown.

Count two, possession of an unlicensed firearm in respect to count one, particulars which are unknown to the State, a contravention of s3 of the Firearms Control Act 60 of 2000 ('Act 60 of 2000').

Count three, possession of unlawful ammunition in respect to count one which was 1 x 9mm Parabellum calibre ammunition/cartridge, a contravention of s90 of Act 60 of 2000.

Count four, a charge of murder in terms of s51(1) of Act 105 of 1997, in that it is alleged the accused killed Nkosentle Muzi Sithole ('Mr Sithole') on 9 October 2020 at the Shell garage near M2 East, Denver.

Count five, a charge of robbery with aggravating circumstances in terms of s1 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977'), in that it is alleged that the accused assaulted Mr Sithole and robbed him of his firearm, aggravating circumstances being that a firearm was used.

Count six, possession of an unlawful firearm in respect to count four, to wit a make star 9mm with serial number 1[...], a contravention of s3 of Act 60 of 2000.

Count seven, possession of unlawful ammunition in respect to count four, a contravention of s90 of Act 60 Of 2000.

Count eight, unlawful possession of ammunition in respect to count four, in that it is alleged the accused was in possession of 3 x 9mm parabellum calibre live rounds, a contravention of s90 of Act 60 of 2000.

Count nine, a charge of murder, in terms of s51(1) of Act 105 of 1997, in that it is alleged the accused killed Kudukwashe Mashaba ('Mr Mashaba') on 7 March 2021 at 16 Scott and Tucker street, Belgravia.

Count ten, a charge of attempted murder in that in the same place and date as count nine, it is alleged the accused attempted to kill Sabelo Christian Myeni, by shooting him.

Count eleven, a charge of unlawful possession of a firearm, in respect to count nine, which is a contravention of s90 of Act 60 of 2000.

Count twelve, a charge of unlawful possession of ammunition, in that in respect to count nine, it is alleged the accused was found in possession of ammunition to with 1 x 9mm calibre live round of ammunition/cartridge, a contravention of s90 of Act 60 of 2000.

[2] The accused is represented by Advocate Mthembu and the State is represented by Advocate Mbaduli.

[3] Prior to pleading, the accused was apprised of his rights to have an assessor, however, the accused elected to proceed without an assessor. The accused was also apprised of the minimum prescribed sentence of life imprisonment in respect to counts one, four and nine, as well as the minimum prescribed sentence of fifteen years' imprisonment in respect to count five. Although Act 105 of 1997 does not apply to the counts of unlawful possession of firearms or possession of ammunition, the accused was informed that if he is found guilty of these crimes, Act 60 of 2000 does stipulate certain sentences.

[4] The accused pleaded not guilty to all counts. In respect to counts one to three, a plea explanation was given, namely that the accused was the driver of a motor vehicle on 20 September 2020 and that a passenger in his car shot the deceased on count one. In respect to the remaining counts, it was a bare denial.

[5] In terms of s220 of Act 51 of 1977, the following formal admissions were made, namely:

In respect to counts one to three

That the deceased on count one is admitted as being Mr Zulu and that he died on 20 September 2020 as a result of gunshot wounds to the neck and head, which he sustained at Jules and Janie Street, Jeppestown. Furthermore, that the deceased did not sustain any further injuries from the time of his death on 20 September 2020 until a post mortem examination was conducted on 21 September 2020 by doctor Ayanda Mohaba Mofokeng ('Dr Mofokeng'). Exhibit 'B1' is the post mortem report and the accused admitted that the contents thereof are correct and admitted same. It was further admitted that Dr Mofokeng received the body of the deceased with serial number D[...] 2[...] on 21 September 2020 from forensic officer Ms Mihle Mhlambi ('Ms Mhlambi') in a safe and untampered manner. Exhibits 'B3' is a statement of Mr David Thobane who is a forensic pathology officer stationed at the Johannesburg Medico-Legal Laboratory and who was on duty on 20 September 2020 and that he received the body of the said deceased on 20 September 2020 from Cst Matundu of Jeppe SAPS in a safe and untampered manner and without any further injuries. The body of the deceased was identified by Clement Nhlanhla Zulu. Exhibit 'C' are the photos of the scene in respect to count one which were admitted as being correct. All the officers who pointed out the scene on count one was admitted. Sergeant Mmola collected (1X cartridge case) at the scene and sealed it with serial number P[...] which was taken by Warrant officer Engelbrecht to the forensic laboratory. Exhibit 'D' was a ballistic report compiled in terms of section 212 (4) (a) and 212 (8) (a) of Act 51 of 1977 and the contents were accepted by the accused as correct. It was admitted that warrant officer Moshoma after inspecting the cartridge found that the cartridge case was that of a 9mm Parabellum calibre.

In respect to counts four to eight

The identity of the deceased, namely Nkosentle Muzi Sithole ('Mr Sithole') was admitted. It was admitted that the cause of death on 9 October 2020 was determined as being 'Gunshot wounds to the chest and abdomen', which

were sustained at the Shell garage, M2 East, Denver. Further that the deceased did not sustain any further injuries from the time of his death on 9 October 2020 until a post mortem examination was conducted on 12 October 2020. Exhibit 'E1' is a post-mortem report completed by Doctor Dandu Claude Mondzanga ('Dr Mondzanga') which was accepted as being correct. It was admitted that the cause of death was gunshot wounds on the chest, abdomen and upper limbs. There were no bruises on the scalp. It was admitted that Dr Mondzanga had received the body of the said deceased on 12 October 2020 from forensic officer Namaranzhe in a safe and untampered manner. The contents of Exhibit 'E3' were accepted as correct in that Mr Ramosonya received the body of the said deceased on 10 October 2020 from constable Van Wyk of Cleveland SAPS in a safe and untampered manner. Mr Ramosonya then in turn transported the body of the deceased to the Johannesburg Medico-Legal Laboratory. It was admitted that Mr Ramosonya found the body of the said deceased at the M2 Shell garage lying on the ground next to a taxi. It was admitted that in respect to exhibit 'E4' that Mzongathandwa Sithole identified the body of the said deceased on 13 October 2020 to a forensic pathology officer at the Johannesburg mortuary to wit Mantshe Motsie. Exhibit 'F' which are the crime scene photos at the Shell garage M2 East, Denver, (in respect to count four to eight), were admitted as being correct. It was admitted that captain Thanwane collected (2 x 9mm cartridge cases) and (1 x spent bullet) at the above mentioned crime scene on 10 October 2020 and sealed the exhibits respectively as follows, exhibit 'B1-B2' as being 2 x cartridge cases with serial number PA6002852683 and 'B3' as being 1 x spent bullet with serial number PA6002852683. That captain Thanwane took the exhibits and official evidence bag to the forensic science laboratory in Pretoria on 14 October 2020. The ballistic report, exhibit 'G', of warrant officer Ngubane was accepted as being correct. It was further admitted that warrant officer Ngubane received an official evidence bag with an official seal number PA6002852683 and PAD001585633 in a safe and untampered manner which contained 2 x 9mm fired cartridge cases and one 9mm fired bullet and that after inspecting the fired cartridge cases and fired bullet she found that, the cartridge cases were not fired from the same firearm and the bullets were not fired from the same firearm.

In respect to counts nine to twelve

The identity of the deceased on count nine was admitted as being that of Kudukwashe Mashaba and that the cause of death was a penetrating gunshot wound to the head which was sustained on 7 March 2021 at 16 Scott and Tucker street, Belgravia and that the deceased did not sustain any further injuries from the time of his death on the 7 March 2021 until a post mortem examination was conducted on 11 March 2021. Exhibit 'H' which is a sworn statement of Dr Lunga Shongwe ('Dr Shongwe'), who conducted the post-mortem report was admitted as correct. It was admitted that Dr Shongwe received the body from forensic officer Ms Mhlungu in a safe and untampered manner. It was admitted that Mr Ramosonya received the body of the said deceased on 8 March 2021 and in the course of his official duties from warrant officer Mohapi of Jeppe SAPS in a safe and untampered manner and without any further injuries to the said body of the deceased. Further that Mr Ramosonya transported the body of the deceased to the Johannesburg Medico-Legal Laboratory without any further injuries to the said body. That Mr Lethoko identified the body of the deceased on 09 March 2021 to forensic pathology officer Ntwanano Rikhotso.

[6] The additional exhibits handed in were as follows:

Exhibit 'J' the OB register which was used in the trial within a trial.

Exhibit 'K' the warning statement of the accused.

Exhibit 'L' the interview with the accused.

Exhibit 'M' the notice of rights read to the accused on his arrest on 27 November 2020.

Exhibit 'N' the charge sheet

Exhibit 'O' the video enhancement report in respect to count four to eight

Exhibit P' enquiry on F/A status

Exhibit 'Q' the statement of Sabelo Christian Myeni

Exhibit 'S' bail conditions set by the Magistrate Court in respect to the accused

Exhibit 'T' OB register reflecting the bail condition reporting dates and times of the accused

Exhibit 'U' pictures of a 2020 Toyota Corolla 1.8 Prestige and a 2021 Toyota Corolla Quest 1.8

Exhibit 'V' statement of Mdumiseni Dlamini

Exhibit 1 photos of the videos taken in respect to counts 4-8

Exhibit 2

[7] The state called the following witnesses in the trial, namely, Mr Mdumiseni Dlamini ('Mr Dhlamini'), Mr Siphelele Mchunu, Nompumelelo Ngwenya, Mr Mthobisi Ngcobo, Martin Nzimande, Silindile Sithole, Bhukumuzi Dlamini, Captain Angel Mthethwa, Colonel Grimbeek, Nhlanhla Hlombe, sergeant Nemangani, sergeant Ndima, Barry Mojele, and sergeant Hadebe. The State then closed their case and the accused testified. The defence also called Zonkizipho Macatsha and Bongani Goodenough Ndwandwe.

[8] The evidence will not be summarised in the order that the witnesses were called but will be summarised in accordance with counts one to three, counts four to eight and counts nine to twelve.

Evidence in respect to counts one to three

Mdumiseni Dlamini

- [9] This witness stated that he knows the accused by sight as he used to see him at the accused's girlfriend's house. The girlfriend was called Gugu. On 20 September 2020 this witness was sitting with other people when the deceased on count one arrived and he was followed by a car with registration number C[...]. The deceased was an uber driver and he drove a Toyota Corolla Quest, black and white in colour. He saw the deceased parking his car on the opposite side of the road and exiting the car with his hands lifted as if in a surrender position. The vehicle with registration number C[...] parked behind him and the driver came out holding a 9mm black firearm and pointed the gun at the deceased and fired a shot. The bullet fell to the ground and the accused then got out of the motor vehicle, from the passenger side, picked up the bullet that had fallen and put it back in the firearm and fired a shot towards the deceased. Prior to the accused firing the shot the deceased even said '*put it there*' and pointed to his forehead. The accused pointed the firearm to the deceased adam's apple on the neck and the bullet penetrated the neck and exited at the back of the neck. The accused's girlfriend then stated that '*the deceased was too forward and it serves him right he must die*'.
- [10] As regards this witness's ability to see what was going on, he stated that although this incident happened at around 20h20 at night, the Apollo light in the Jeppe park created enough light for him to see.
- [11] During cross-examination this witness stated that he made a statement quite some time after the incident happened. The statement was not read back to him by the police officer and he also did not read it, he merely signed it as he was told to sign and then left. He did not read it before he testified. The statement was provisionally allowed and eventually handed in after the defence called constable Macatsha. It was marked as exhibit 'V'.

The accused's version on counts one to three

- [12] The accused in respect to counts one to three testified that he worked as an uber driver and that he was arrested on 27 November 2020. At the time he was arrested he was no longer working as an uber driver for Mr Mchunu. Mr Mchunu owned three vehicles, two vehicles were Toyota Corolla's, silver in colour and one of these vehicles had registration number C[...]. He stated that there were two drivers who took turns to drive the vehicle with registration number C[...]. The other driver was Mr Mhlongo who has since passed away. The third vehicle was a white Toyota Corolla with registration number F[...]. The accused stated that he would also drive the vehicle with registration F[...] and then Mr Mhlongo would use the vehicle with registration C[...]. The accused stated that when Mr Mchunu employed him, the car that was assigned to him to drive was the vehicle with the registration number F[...].
- [13] The accused stated that on 20 September 2020 he was the driver of C[...] the whole day and night. He had knocked off from work and was on his way to see his girlfriend, namely Gugu Nkosi. Whilst at his girlfriend's place a certain gentleman, whom the accused referred to as 'Homies' asked him in Zulu to take him to buy food. The accused's girlfriend only knew this man by sight. Homies offered to pour petrol for this trip. The occupants of the car were the accused as driver, his girlfriend in the front passenger seat and the two other men in the back seat. The accused left his girlfriend's place with all these people and drove into Jules street. At a four-way intersection another white Toyota Corolla came and without right of way entered the intersection. In order to avoid an accident, the accused drove onto the pavement. Both he and the driver of the other motor vehicle stopped. The accused asked the other driver what he was doing and that driver lifted his hands in an apologetic stance. The accused stated the other driver was drunk. Two men, who also appeared drunk then exited from the other drivers car and one of them picked up a brick and hit the left side of his car. The accused's girlfriend then alighted from the car and the man whom he was transporting also alighted and asked the other driver '*what was he doing*'. The accused then heard and saw the passenger he was transporting cocking a firearm, pointing it to the other people and then he heard the sound of a firearm. The driver of the other car then fell down. The accused's passenger then told him to leave. Whilst

driving, the accused asked the passenger why he shot the other driver and the other passenger stated that because the other driver had hit the accused's car he appeared aggressive and was fighting. The accused brought this passenger back to where he had picked him up as he was no longer seeing eye to eye with him. He stated that on the following day he phoned the owner of the car, namely, Mr Mchunu, and told him about the incident. The accused was not sure if the man who was shot had died or not. He stated that he never remained at the scene of the shooting as the other man who shot the deceased directed him to leave the scene. The accused never gave a statement to the police about what had transpired.

Evaluation count one to three

[14] The viva voce evidence of Mr Dhlamini is that he knew the accused, as the accused often would frequent a woman called Gugu, who was the accused's girlfriend. His version in court is that the driver first got out from vehicle C[...] and then the accused got out from the passenger side, picked up the bullet, put it back in the gun and fired the shot.

[15] In Mr Dhlamini's statement, the version is that a tall thin black male, dark in complexion came out of the back passenger door and cocked the firearm and failed to fire a shot as the firearm jammed. He cocked it again and the bullet fell to the ground. The driver then came out and took the gun, picked up the bullet, inserted it into the firearm, cocked it and fired a shot. The girl was in the back passenger seat.

[16] The difference between the evidence in court and the statement, is that in the former, the accused got out from the passenger seat, whereas in the statement the accused was the driver. In the viva voce evidence it is the accused and not the other man who fired the deadly shot. An additional difference is that in the evidence in chief the accused identified both the accused and the girlfriend, whereas in the statement, this witness stated he could not identify the suspects.

[17] As regards these contradictions, the decision of *S v Mafaladiso en Andere* ('Mafaladiso') 2003 (1) SACR 583 is apposite. In the matter of *Mafaladiso*, the

Supreme Court of Appeal stated that when there are contradictions between the statement of a witness and what that witness stated in court, one must differentiate between whether a witness is erring due to recollection or because of dishonesty. The Supreme Court of Appeal went further to say that there may be cultural and language differences between who took down the statement and the witness and that a statement is not taken down by means of cross-examination and that the person giving the statement is seldom asked by the police to explain in detail what happened. The Supreme Court of Appeal held that not every error by a witness and not every contradiction or deviation affects credibility.

[18] In considering the evidence of this witness, as compared to that of the accused, what is common is that the deceased came out of his vehicle with his hands up as if in a surrender position and that both the accused and his girlfriend were at the scene when this offence was committed. The fact that the deceased was shot is also common cause. Furthermore, this witness stated that the accused used a 9mm handgun and this is corroborated by the report of warrant officer Moshoma, exhibit 'D' who completed the ballistic report and who inspected the spent cartridge found at the scene and concluded that the cartridge case was that of a 9mm parabellum calibre. The post-mortem report also corroborates the evidence of Mr Dhlamini in that Doctor Mofokeng on exhibit 'B' found that there was an entrance gunshot wound on the anterior aspect of the neck. The photos in exhibit 'B' clearly show this entrance wound is close to the adam's apple of the deceased.

[19] As regards the honesty of Mr Dhlamini, he cannot be faulted in respect to these common cause aspects. The problem that the court has is that constable Macatsha who took down his statement, cannot remember if she read it back to him or if he read it himself. All she is certain of is that it was understood. Due to the fact that this court is uncertain as to whether constable Macatsha correctly noted what the witness stated, as opposed to what the witness stated in court, the remaining question this court must consider is whether he has erred due to his recollection or dishonesty. I have approached his evidence with caution and even though there is a difference between his statement and his viva voce evidence, this court cannot find that he is a dishonest witness as there are many common cause aspects between his

evidence and that of the accused. As regards the aspect that in his statement he allegedly did not know the suspects or the girls name, it is important to note that he stated in his statement that he didn't know her name but one of his friends knew her name. Mr Dhlamini also knew where the accused stayed, namely at the Maliyami hostel which was one street after Jani street. This was never disputed by the accused during cross-examination. There is no way Mr Dhlamini would know the address of the accused, unless he had seen him before and had a proper understanding of where he lived. As a result, this Court questions the accuracy of the statement taken down by constable Macatsha when she wrote that Mr Dhlamini would not be able to identify the suspects.

[20] In evaluating the evidence presented on counts one to three, a Court must not decide the matter in a piecemeal fashion but all the evidence in its totality must be taken into account and considered. (see *S v Radebe* 1991(2) SACR 166 (T). A court must apply its mind not only to the merits or demerits of the State and the defence witnesses, but also to the probabilities of the case and the evidence in its totality. (see *S v Guess* 1976 (4) SA 715 (A) at 718H – 719A and *S v Mhlongo* 1991(2) SACR 207(A) at 210I – J). The probabilities in this particular matter must also be tested against the proven facts that are common cause. (see *S v Abrahams* 1979 (1) SA 203 (A) at 207 A – H).

[21] Mr Dhlamini was adamant during cross-examination that apart from the deceased getting out of his car, there was not two additional men that got out of the deceased's car. During cross-examination it was put to Mr Dhlamini that one of the two men hit the accused's car on the bonnet, however, it was not put to Mr Dhlamini that a brick was thrown at the car. If a brick had been used surely Mr Dhlamini would have seen this. The fact that it was not put to Mr Dhlamini for his comment suggests that it is a recent fabrication on the part of the accused. What is extremely strange is that according to the accused's version it is not the deceased who allegedly threw the brick to the accused's car, it was one of the two other men who were in the accused's car who did this, yet according to the accused his passenger then shot the deceased and not the man who threw the brick.

[22] This version is extremely improbable for the following reasons. Firstly, according to the accused, the deceased was drunk and harmless in that he had his hands held up as if to surrender, therefore there is no logical reason to shoot the non-aggressive party. It is clear that the accused was aggressive from the onset, which explains why the deceased found it necessary to raise his hands to avert danger. Secondly, Mr Dhlamini never saw two other men exiting the deceased's vehicle. Thirdly, there appears to be no reason why Mr Dhlamini would want to falsely incriminate the accused by stating that the accused was the one who shot the deceased. During the cross-examination of Mr Dhlamini, no version was put to him as to why he would want to falsely incriminate the accused. Fourthly, the version of the accused that he phoned Mr Mchunu the day after the incident to inform him what happened, was never put to Mr Mchunu for his response, as a result it amounts to a recent fabrication. Had Mr Mchunu been informed of this vital information he would most definitely have spoken about it in his evidence in chief. There is no logical explanation why he would withhold this information. All that Mr Mchunu spoke about in court was that the police phoned him to say a case had been opened at Jeppe and Sandton concerning the car the accused had been driving.

[23] Mr Dhlamini is a single witness and in these circumstances the most important question to be answered by a trial Court is whether the witness was a credible witness. A trial court should weigh the evidence and consider the merits and the demerits. This will test whether the evidence is trustworthy and truthful, despite shortcomings, defects or contradictions therein. This exercise of caution should be exercised with common sense. (see *S v Sauls* 1981 (3) SA 172 (A) at 180 E – G). Section 208 of Act 51 of 1977 provides that 'an accused may be convicted on the single evidence of any competent witness.' The evidence of such a witness should be treated with caution. (see *S v Mnguni* 1994 (1) SACR 579 (A) at 581 I – J). Even though there is a contradiction between his statement and his viva voce evidence, which this Court has already addressed, this Court finds that during the cross-examination of Mr Dhlamini he did not contradict himself at any stage during

his evidence. He testified clearly, logically and was honest. He did not exaggerate any part of his evidence and conceded aspects he did not know or could not remember.

[24] Identity is not in dispute as the accused confirms he was at the scene of the shooting.

[25] The accused's version of not being involved in this shooting is rejected by this Court as false and not reasonably possibly true. He was evasive as to why he never reported the matter to the police the next morning. In fact, under cross examination the accused conceded that he had no intentions of informing the arresting officer about the passenger or the incident. This is evident in his warning statement as he kept quiet about what had transpired. This Court finds that he was angry about a brick being thrown at his car and that he was the aggressor. This court finds that he did shoot the deceased and that a 9mm parabellum firearm was used. Accordingly, in the absence of the accused being in possession of a valid firearm licence, he is found guilty of being in possession of an unlicensed firearm and ammunition.

Evidence in respect to count four to eight

Sphelele Mchunu

[26] This witness testified in respect of counts four to eight as his evidence relates to the use of his car with registration number C[...]. He stated that he has three cars, namely two silver coloured Toyota Corolla Quest motor vehicles with registration numbers C[...] and C[...] respectively. His third motor vehicle is a white Toyota with registration number F[...]. C[...] and F[...] were the only cars that were used for uber purposes. He had employed the accused and assigned motor vehicle C[...] to him. The accused would only bring his car back if it had to be fixed. On 9 October 2020 the car with registration number C[...] was in the possession of the accused. He only took the car from the accused on 20 or 25 October 2020 as the accused was no longer earning R2500 from the use of the vehicle as agreed upon.

[27] He then gave the car C[...] to Mr. Nkosi who was driving the same car when the police impounded the car. There were instances the accused was driving F[...] but that was during the times when the accused and Mr. Mchunu were together. Mr Mchunu was not aware of the agreement between Mr Mhlongo and the accused that would lead to them exchanging cars and if such happened that was between the accused and Mr Mhlongo. Mr Mhlongo was assigned the motor vehicle with registration number F[...] and another white driver was then assigned the vehicle with registration C[...].

[28] Mr Mchunu is a single witness on the aspect as to whom the respective motor vehicles he owned were assigned to but he could not say if the accused had given it to someone else. This witness impressed this Court.

Silindile Sithole

[29] This witness testified that she is the sister to the deceased Mr Sithole who was driving the taxi on 9 October 2020. On the day in question she was going home to KwaZulu-Natal in the taxi driven by the deceased. The taxi was travelling in the evening and it went to the Shell Garage situated on the M2. The deceased was from time to time answering his phone as if reporting to someone where he was. At the shell garage the deceased put petrol in the taxi and checked the water and oil. The passenger's luggage was also removed from the taxi to allow passengers to relax.

[30] She stated that she was sitting on the seat behind the driver when a small car arrived and the occupants were playing Zulu or maskandi music. This car parked next to the taxi. The vehicle then moved away from the taxi and parked at the corner of the garage. There were four occupants in that vehicle. Two males then alighted from the vehicle that had moved to the corner of the garage and went straight up to the deceased. These men tapped the deceased on the back and said '*hey hey*'. They then took the deceased's firearm which was on his waist. She stated that the man who removed the firearm from the deceased was the accused. The deceased then raised his hands as if in a surrender position. The accused cut the deceased on his forehead and blood was oozing down the deceased's forehead. The deceased was then shot in the left temple. The man with the cap left with the accused's

firearm. The man wearing the cap was the accused. The accused had a small beard like a goatee and below his nose was a moustache. The accused also had traditional incision marks on his face on both cheeks. She could not describe the other person who was with the accused.

Bhekumuzi Dlamini

[31] He is a colonel in the South African Police Service, he had attended the scene of crime and viewed the video footage which was downloaded to a USB. He handed the video footage to the late Captain Mthembu. The video footage had been provisionally admitted as evidence however the defence made further admissions to this effect and the video evidence was formally admitted as being correct.

Colonel Griembek

[32] He received the video footage and analysed it. He then took still photos from the video footage. This was marked as exhibit 'N'.

Sergeant Dhlamini

[33] He collected the video footage from the shell garage three days after the incident. The footage was downloaded and stored on a USB cable which he handed over to Captain Mthembu.

Sergeant Ndimma

[34] He testified that he took down the statement of Silindile Sithole and that she did not mention any traditional incisions on the suspect's face in her statement. He was also requested to see if the accused had any traditional incisions. He stated that he could see an incision on the left side of the accused's cheek and others on the forehead between the eyes.

Accused's version in respect to counts four to eight

[34] The accused denied that he was given the motor vehicle C[...] by Mr Mchunu to drive. According to the accused he was employed for the vehicle with registration number F[...]. In the evidence in chief the accused said that he would use the car C[...] if there was a problem with his car with registration number F[...]. He then stated that he would use the vehicle C[...] interchangeably with Mr Mhlongo as one preferred driving in the day and the other at night. Then he added that if both wanted to do night shift they would negotiate between the two of them. During cross-examination he stated that the vehicle with registration number F[...] was the newest vehicle and if long journeys were scheduled then the vehicle with registration number F[...] would be used and he would then use the vehicle C[...].

[35] He stated that he was arrested on 27 November 2020 for counts four to eight. He stated he could not recall where he was on 9 October 2020. He denied it was him on the video. He could not recognise any of the two perpetrators on counts four to eight. He stated on that day of 9 October 2020 he was driving vehicle F[...]. He stated that Mr Mhlongo passed away mid 2021. During cross-examination he stated it could have been Mr Mhlongo who committed the murder on count four.

[36] He stated that he did not have traditional incisions on his face, only scars which he had obtained as a result of a car accident and whilst growing up.

[37] The accused called Bongani Ndwande who supported his version that the Ndwande clan do not put incisions on their faces.

Evaluation counts four to eight

[38] Silindile Sithole initially stated she saw traditional incisions on both the cheeks of the accused, yet when she was asked to approach the accused she only pointed an incision on his left cheek. During cross-examination Silindile Sithole also stated that the traditional marks were not big or small they were medium. This court noted a very big scar on the left cheek of the accused

which is definitely a scar. This Court did not see traditional marks on the face of the accused when he approached the bench.

Lack of supporting medical evidence for the witness Silindile Sithole

[39] Dr Mondzanga stated in his medical report that due to the multiplicity of gunshot wounds it was difficult to determine the track of the bullet, however the bullet recovered on the muscles of the right shoulder appears to have come from the entrance wound on the right upper back. The cause of death was determined as being gunshot wounds to the chest and abdomen. This medical evidence does not support the evidence of Silindile Sithole who states the deceased was shot in his left temple and that he was cut on his forehead. The doctor saw no incisions on the forehead of the deceased. The only corroborating evidence is that Silindile Sithole states that whilst the accused was on the floor these men shot him again on the right side of the rib cage.

Lack of supporting video evidence for the witness Silindile Sithole

[40] This court saw the video and it is clear that two men approached the taxi of the deceased. One was wearing a red cap and blue trousers and the other one was wearing a blue work overall with reflector pads. The registration number of the car that pulled up next to the deceased's vehicle was C[...]. However, Silindile Sithole stated that the accused was wearing a long coat that came to his knees. It is clear to this court that the man with the red cap was not wearing a long coat. This Court could also not see four occupants in this car.

Lack of identification parades

[41] It was crucial on counts four to eight to have an identification parade yet, for various reasons this was not held. Sergeant Nemangane testified that he was the investigating officer in this case and arrested the accused. He did not conduct any identification parade because the accused was granted bail before they held the identification parade. This is not a valid excuse. The

current investigating officer of all three murders is sergeant Ndimma and he stated that no identification parades were held in respect to any of the crimes committed because it was during COVID -19 and they were not permitted to hold identification parades in prison.

Lack of circumstantial evidence

[42] Sergeant Nemangani also never found the firearm of the deceased in the house of the accused and neither did he find any clothes that resembled the clothes on the video.

[43] All the evidence presented on counts four to eight has not convinced this Court that it is the accused who shot the deceased. He is accordingly acquitted on counts four to eight.

Evidence in respect to counts nine to twelve

Sergeant Berry Moje

[44] He recorded the statement of Sabelo Christian Myeni and this statement was read into the record after this Court made a finding in terms of s3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 that it was admissible. The statement was then commissioned by sergeant Hadebe.

Mthobisi Ngcobo

[45] He testified that he is an owner of a carwash where he would also host events. He knew the accused by sight as he would see him from a distance as he used to come to the carwash to wash his car. He could not state how many times he had seen the accused, but he knew that the accused lived in the same area as his carwash. The car the accused would be driving would be a white Toyota Quest. On 7 March 2021 he had an event at the carwash which was around eleven at night. He saw the accused there that night. Whilst he was inside he heard a shot of a firearm.

[46] He went outside to investigate and found a motor vehicle in the middle of the road that was stationary. The said vehicle was a white Toyota corolla with registration number H[...]. The driver's door was open. He came closer and observed the accused holding a firearm. It was a 9mm firearm black in colour. The accused uttered the following words, namely '*These people must move if not I will shoot them*'. He approached the accused and calmed him down and asked him to move his vehicle. The accused was in the company of a lady. The lady came out of the passenger seat and called out to the accused '*Lets go*'. He did not know the lady, and it was the first time for him to see her. They both got into the motor vehicle and drove off. He stated that the accused was the only one who had possessed a firearm on the night in question. There was good visibility which was created by the spot lights outside his venue. He was told that the deceased Tebogo Mashaba had been shot and was lying on the ground. This witness then boarded a car and took chase to see if the Toyota Corolla was still in the area but did not find it.

[47] He stated that Sabelo Myeni had been injured as he showed him a scar on the left cheek as a result of the bullet passing past the left side of Sabelo Myeni's face.

Nompumelelo Ngwenya

[48] This witness stated that on 7 March 2021 she came with Nhlanhla Hlombe to Mapholoba's car wash. She was sitting inside a motor vehicle. The deceased was dancing next to the motor vehicle when she noticed something pouring on her face and glass breaking. She alighted from the vehicle and discovered the deceased's body lying in a pool of blood. She went to call Nhlanhla who was talking to a person in a white motor vehicle. Nompumelelo was not cross examined by the defence.

Nhlanhla Hlombe

[49] The evidence of this witness is along the lines of Nompumelelo's evidence save to say that he went to greet his brother who was in the tent inside the

carwash. He also heard the sound of the gunshot. When he went to investigate he saw people were running away. He could hear Nompumelelo shouting at him saying '*your friend your friend*'. When he got to his car he saw his car window had been broken. He approached a white Toyota corolla after the shooting, and asked what is happening. He did not see the face of the driver. The driver was wearing a white cap. The person driving that Toyota corolla pointed him with a firearm and asked him if he wanted to die. The said Toyota corolla drove off. There was a lady sitting in the passenger seat and a male driver inside the said Toyota corolla. It was the girl in the car who told this man to drive off. The deceased was lying on the ground and he saw blood.

Martin Nzimande

- [50] He is the owner of the white Toyota Corolla Prestige with registration number H[...]. He was working in Cape Town when the accused telephoned him requesting to borrow the car. This witness lent the accused this car from 4 March 2021 to 12 March 2021. The accused had told him that he wanted to go to KwaNongoma to do a traditional ceremony. He received a telephone call from the police on 11 March 2021 asking his whereabouts and informing him that his vehicle had been involved in the commission of the offence, namely the car had been spotted during a shoot-out. The accused's girlfriend Gugu informed him that he must collect the motor vehicle as the accused was signing at Cleveland police station as he had been arrested.

Sabelo Myeni

- [51] This witness was not called. His statement was however handed in, in terms of s3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, as the investigating officer could no longer trace him. The statement indicates that on 7 March 2021 this witness was at the carwash. He was shot whilst collecting his cell phone in the car. He was bleeding on his cheek and right ear. The man in the white Toyota quest was holding a firearm.

Barry Mojele

[52] He testified that he was the one who took down the statement from Sabelo Myeni.

Sergeant Bulelani Hadebe

[53] He commissioned the statement of Sabelo Myeni. He was the investigating officer in respect to counts nine to twelve. He stated that the accused was arrested on counts nine to twelve whilst the accused was signing for his bail conditions at Cleveland SAPS. This witness stated that he also heard from Mthobisi Ngcobo that he had seen the accused in possession of a firearm at the carwash and that the accused was driving a white Toyota Quest and that he was in the company of a lady. He stated he could not have an identification parade as the witnesses on counts nine to twelve were not cooperative.

The accused

[54] The accused raised an alibi in respect to counts nine to twelve in that he said he had left on Friday evening 5 March 2021 to go to KwaNongoma in Kwazulu-Natal where he had a traditional ceremony and returned on Tuesday morning 9 March 2021. He remembered this because 6 of March was his birthday. The traditional ceremony had to do with his grandmother.

[55] The accused stated that he reported to Cleveland police station to comply with his bail conditions on a daily basis after he was released on bail on the counts one to three and counts four to eight. He stated that he would present himself every day and if he failed to appear, the police would allow him to make up by signing for the days he missed.

Evaluation counts nine to twelve

Mthobisi Ngcobo

[56] This witness impressed this Court. During cross-examination he was adamant that he had seen the accused on previous occasions at his car wash and that he saw him on the evening of 7 March 2021 driving a motor vehicle with registration number H[...] and wearing a black leather jacket. The accused was in the company of his girlfriend. He was honest in that he said he did not see the accused firing a shot when the shot was fired. This is acceptable as he was inside when the shot was fired. However, he was adamant that it was the accused that was holding a firearm in his hands. If he wanted to falsely implicate the accused he could easily have said the accused fired the shot as well. This witness was adamant that the accused was aggressive and that he was shouting at the people to move away or he would shoot them. This Court finds no reason for this witness to lie. He is an independent witness. No version was put to this witness by the accused's legal representative why he would have a motive to falsely implicate the accused. As a result, this Court finds that what he saw on 7 March 2021 was the accused and that the accused was holding a firearm in his hands and shouting at the people and furthermore that the accused was the only person holding a firearm. As a result, the only reasonable inference that this Court can draw is that it was the accused who fired the shots to the deceased and Sabelo Myeni.

Contradictions and corroboration amongst state witness

[57] The witness Mthobisi Ngcobo did not see a cap on the head of the accused. In his statement he said the accused was short and black in complexion. Nhlanhla Hlombe said the man in the white Toyota Corolla had a cap on his head. It is true this is a contradiction, however, both Mthobisi Ngcobo and Nhlanhla Hlombe refer to a man who was aggressive and was in possession of a firearm and who was in a white Toyota Corolla with his girlfriend. Both witnesses only saw this man holding a firearm and no one else. It is clear both are talking about the same man.

[58] The statement of Sabelo Myeni, who did not testify and whose statement was handed in in terms of s3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 also stated the man who had the firearm had a cap on. This witness also

stated that this man was light in complexion as opposed to Nhlanhla Mlombi who said this man was dark in complexion. This is a contradiction but not material. This incident happened at night and these witnesses viewed the events from different positions. The lighting could have cast shadows on the face causing one witness to see the accused as dark in complexion and the other as light in complexion. What is important in the statement of Sabelo Myeni is that he corroborates Mthobisi Ngcobo that the man in the white Toyota Quest was the man who was having a firearm in his possession.

Martin Nzimande

- [59] This witness impressed this Court. He was adamant that he lent the car with registration H[...] to the accused. He denied the version put to him during cross-examination that the accused was in possession of the vehicle the week after 7 March 2021.

Probabilities on counts nine to twelve

- [60] The version that the accused was in Kwazulu-Natal on 7 March 2021 was not put to Mthobisi Ngcobo, Nompumelelo Ngwenya or Nhlanhla Hlombe. This version was only put to Martin Nzimande. The fact that it was not put to the eye witness Mthobisi Ngcobo suggests it was a recent fabrication raised later in the trial. The witness Mthobisi Ngcobo was an arms-length away from the accused. There is no reason for him to be mistaken that it was the accused.
- [61] Various factors are to be taken in account when evaluating the identification of an accused, for example the lighting, visibility, eyesight, the proximity of the witness, the opportunity for observation, prior knowledge of the suspect, the mobility of the scene, corroboration, suggestibility, features of the suspect, and the evidence tendered by the accused. The court must be sure that a witness has a proper recollection of the accused and not merely an impression. This includes a consideration of whether the circumstances were

ideal to make an observation.¹ The witness Mthobisi Ngcobo was honest and his identification reliable.

- [62] The fact that neither Nompumelelo Ngwenya or Nhlanhla Hlombe placed the accused on the scene suggests to this Court that they did not collude with Mthobisi Ngcobo to implicate the accused falsely. All three witnesses were honest.

Alibi

- [63] In evaluating the defence of an alibi, the Appellate Division, as it then was, in the case of *R v Hlongwane*² stated as follows: 'At the conclusion of the whole case the issues were: (a) whether the alibi might reasonably be true and (b) whether denial of complicity might reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown has failed to prove beyond a reasonable doubt that the accused was one of the robbers.'³ The phrase 'might reasonably be true' clearly refers to both denial of complicity and alibi. If the version of the accused is reasonably possibly true they must be acquitted.
- [64] For the court to convict the accused, their version or alibi must be false beyond a reasonable doubt.⁴ In the matter of *S v Musiker*,⁵ the Supreme Court of Appeal held that once an alibi has been raised, the alibi has to be accepted; unless it can be proven that it is false beyond a reasonable doubt.⁶
- [65] The accused stated that he was in the company of Sbonelo Ntsele when he left for Kwazulu-Natal. This witness was not called to support the accused's version. No one else who attended this traditional ceremony in Kwazulu-Natal was called to support the accused's version.

¹ See *S v Nango* 1990 (2) SACR 450 (A) at 455F - 456B and *S v Mthetwa* 1972 (3) SA 766 (A) at 768 A - C).

² *R v Hlongwane* [1959] 3 All SA 308 (A); 1959 (3) SA 337 (A) at 339C-D

³ Ibid page 339 C-D

⁴ see *Shusha v S* [2011] ZASCA 171 para 10

⁵ *S v Musiker* 2013 (1) SACR 517 (SCA)

⁶ Ibid para 15-16

- [66] There are shortcomings to the accused's alibi when one looks at the signing registers for his bail condition. Exhibit 'S' depicts clearly that on 5 March 2021 the accused reported to Cleveland SAPS at 14h10. On 6 March 2021 he reported at 08h40. On 7 March 2021 he reported at 14h25. On 8 March 2021 he reported at 08h40. On 9 March 2021 he reported at 08h00. Exhibits T (i), (ii) and (iii), which are extracts from the OB register correlate with exhibit 'S'. Entry 431 on 'Ti' confirms that the accused signed at 08h40. The previous entry, namely 430 states that someone else also signed for their bail conditions at 07h43 and entry 432 reflects an accident report which was made at 14h30. In respect to 7 March 2021, the OB register exhibit 'Tii' under entry 503 reflects that the accused signed at 14h25 for his bail conditions. The previous entry is 502 and the time is 13h57 and it relates to an R5 rifle that was booked out. The entry at 504 was made at 15h20 and relates to a suspect being transferred. On 8 March 2021 the entry at 569 on exhibit 'Tiii' reflects the time of 08h40 and it relates to the accused signing for his bail conditions. The entry prior to that, namely 568 was made at 08h30 and the entry after 569, namely 570 was made at 09h15.
- [67] The version of the accused that he was allowed to sign retrospectively and that spaces were left for him to sign is rejected by this court as false and not reasonably possibly true. Although the accused states that he was accustomed to the police officers at Cleveland SAPS who allowed him to sign in this manner, no police officers were ever called by the defence to support this version of the accused. There is no way that the police stations would keep the OB register open with blank spaces and then fill in the dates and times when the accused reported for his bail conditions. This is too far-fetched.
- [68] It is clear that this version of leaving spaces in the OB register and that the accused obtained permission from sergeant Nemangani to go to Kwazulu-Natal was never put to sergeant Nemangani for his response, which once again suggests it was a recent fabrication of the accused.

[69] The version of the accused that he was in Kwazulu-Natal has been weighed against the totality of the evidence led. It is highly improbable that the accused would be in Kwazulu-Natal performing a traditional ceremony and at the same time be able to sign at Cleveland SAPS. Taking into consideration the OB register entries and the evidence of the witnesses who saw the accused at the scene on 7 March 2021, the accused's version that he was in Kwazulu-Natal on 7 March 2021 is extremely improbable and is rejected as false and not reasonably possibly true.

Similar fact evidence

[70] Similar facts has always been clouded by confusion in South African law until the Constitutional Court eradicated same in the decision of *Savoi & Others v National Director of Public Prosecutions & Another*⁷ where it held that:

‘...the debate above adequately demonstrates that in South Africa there is still ample room for a less restrictive approach to the admission of similar facts. What emerges from this is that not all similar fact evidence that is inadmissible according to South African law would automatically render a trial unfair if admitted.’⁸

[71] In the matter in casu there is a sufficient link between similar facts and facts in issue, as a result, the similar fact evidence becomes admissible. The link is found in proximity of time, method and the circumstances in which the events occurred.

[72] In counts one and counts nine, the accused was seen holding a 9mm firearm whilst he was in the company of his girlfriend who sat in the passenger seat of his car. In both instances the accused was aggressive to other car drivers and fired a shot to express his displeasure. In both these instances the girlfriend of the accused was heard uttering words and encouraging the accused.

⁷ *Savoi & Others v National Director of Public Prosecutions & Another* 2014 (1) SACR 545 (CC)

⁸ *Ibid* para 58-59

[73] Accordingly, the accused is found guilty of murder on count nine, attempted murder on count ten, possession of an unlicensed firearm on count eleven and unlawful possession of ammunition on count twelve.

Findings

[74] The court makes the following findings:

In respect to count one the accused is found guilty of murder. It is clear that he had the intention in the form of *dolus directus* to kill the deceased. The accused was charged with murder in terms of s51(1) of Act 105 of 1997. The murder in respect to count one was not pre-meditated. It was committed in a state of road rage. Accordingly, the provisions of s51(1) of Act 105 of 1997 do not apply. As a result, this Court finds that this murder falls under the provisions of part two of schedule two.

In respect to count two the accused is found guilty of possession of an unlicensed firearm.

In respect to count three the accused is found guilty of unlawful possession of ammunition.

In respect to count four the accused is acquitted.

In respect to count five the accused is acquitted.

In respect to count six the accused is acquitted.

In respect to count seven the accused is acquitted.

In respect to count eight the accused is acquitted.

In respect to count nine, the accused is found guilty of murder on the basis of *dolus eventualis*. The accused was charged with section 51(1) of Act 105 of

1997. The circumstances of this count are different to those on count one. The accused did not just by accident arrive at this scene of the carwash like he did in count one. The accused had been there for some time. When the people did not move their cars he decided to take the law into his own hands and started shooting. It is clear that he had planned that if the people would not move he would shoot them and this is what he did. In respect to count nine this Court is satisfied that this murder falls within the ambit of s51(1) and is a part one of schedule two offence.

In respect to count ten the accused is found guilty of attempting to kill Sabelo Myeni. The evidence of Mthonsi Ngcobo clearly depicts how the bullet hit the face of Sabelo Myeni. This bullet could easily have killed Sabelo Myeni.

In respect to count eleven the accused is found guilty of possession of an unlicensed firearm.

In respect to count twelve the accused is found guilty of unlawful possession of ammunition.

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JUDGE OF THE HIGH COURT
JOHANNESBURG

Date Heard: 14 May 2024

Judgment handed down: 21 May 2024

Appearances:

On behalf of the State: Adv. V.E Mbaduli

On behalf of the Accused: Adv. I Mthembu

